In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-141

SOUTHLAND MANUFACTURING CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. In February 1967, the court of appeals sustained the Board's findings that Southland Manufacturing Corporation violated Sections 8(a)(1), (3), and (5) of the National Labor Relations Act by discharging employee Crimilda Acosta on June 8, 1964, by refusing to reinstate her and 49 other striking employees upon their unconditional offers to return to work in October 1964, and by shutting down its plant and unlawfully locking out 300 employees from December 7, 1964 to January 11, 1965. *United Hatters, Cap and Millinery Workers International Union, AFL-CIO* v. *National Labor Relations Board*, 375 F. 2d 325 (C.A.D.C.), enforcing 157 NLRB 1356. The Board's order, which the court enforced, directed the Company, *inter alia*, to reimburse Acosta, the other unlawfully discharged striking em-

ployees, and the employees who were unlawfully locked out for any loss of pay resulting from the unfair labor practices committed against them. However, as it appeared that the Company had substantially curtailed its business activities for economic reasons, the portion of the order concerning the reinstatement of the striking employees was made contingent upon the Company's resumption of its operations.[1] The Company never fully

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[1]The Board stated (157 NLRB at 1357-1358):

> We shall order the Respondent, in the event it resumes its operations, to offer to Crimilda Acosta and to those striking employees, who were discriminatorily discharged or denied reinstatement, immediate and full reinstatement to their former or substantially equivalent positions and make all such employees whole for any loss of earnings they may have suffered by reason of the unlawful discrimination against them; backpay to run only to the date in February 1965 when the Respondent shut down its plant, the exact date to be determined at the compliance stage. We shall also require the Respondent to make whole those nonstriking employees who were unlawfully locked out from December 7, 1964, to January 11, 1965.
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> * * * *
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> We also expressly reserve the right to modify the backpay and reinstatement provisions * * * if made necessary by a change of conditions in the future, and to make such supplements thereto as may hereafter become necessary in order to define or clarify their application to a specific set of circumstances not now apparent.

The Board's order required the Company, *inter alia*, to (157 NLRB at 1359):

> (a) Make whole Crimilda Acosta, all striking employees whose names appear in the attached Appendix B, and all employees who were locked out on December 7, 1964, for any loss of pay they may have suffered by reason of the discrimination practiced against them, in the manner set forth in the section of the Trial Examiner's Decision entitled "The Remedy," as modified by our Decision herein.
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> (b) Create a preferential hiring list containing the names of Crimilda Acosta and all striking employees included in paragraph 2(a), above, as being entitled to reinstatement if and when Respondent reopens its plant. * * *

resumed its business and an alleged successor, Propper International Inc., acquired certain of the Company's facilities and commenced a substantially similar operation (Pet. Add. 4). Thereafter, following supplemental proceedings, the Board, in November 1970, decided that Propper was not a successor to the Company, and that the Company remained solely responsible for complying with the provisions of the Board's order. *Southland Manufacturing Corp. and Propper International Inc.*, 186 NLRB 792 (A-1. 1-3).[2]

2. The Board, on January 22, 1971, then issued a specification setting forth the backpay claims of the 350 employees (A-1. 4-9). In its amended answer, the Company merely alleged that the backpay specification did not reflect that "some of the employees" had received additional "interim earnings and compensation," and that certain unspecified employees had received "vacation pay" and "wages" (A-1. 12-13, 51-53, 66). At the hearing held on April 19, 1971, the Company for the first time raised the affirmative defense of willful loss of earnings and moved to dismiss the specification on the grounds that the Company's backpay liability was wholly contingent upon its resumption of operations, and that the Board was guilty of laches, had failed to follow its own procedures in compiling the specification, and had disregarded the Company's inability to comply with the affirmative provisions of the remedial order (A-1. 53-57).

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[2]"A-1." refers to the first volume of the appendix to the briefs in the court below. Copies of both volumes have been lodged with the Clerk.

The Board ruled that the Company's answer lacked the specificity required by Section 102.54(b)[3] of the Board's Rules and Regulations to raise the issues of interim earnings or willful loss of earnings. The Board also rejected the Company's contention that the Board's original order relieved it of any backpay obligation unless it resumed operations (A-1. 52, 55, 66, n. 3). The Board ordered the Company to pay the sum of $132,305, with interest (A-1. 57-58).

3. The court of appeals upheld the Board's backpay award (Pet. Add. 1-6). It concluded that, whatever the correct "strict grammatical construction" of the language used by the Board in its original order, the Board had reserved "the right to modify the backpay provisions as required in the future," and that it had acted properly in clarifying, in its supplemental order, the Company's backpay liability. "It does not seem rational," the court added, "to suppose that either the court or the

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[3]In relevant part, 29 C.F.R. 102.54(b) and (c) provide as follows:

> (b) * * * As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross back pay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, he shall specifically state the basis for his disagreement, setting forth in detail his position as to the applicable premises and furnishing the appropriate supporting figures.
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> (c) * * * If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting said allegation.

Board contemplated that Southland could escape liability for backpay in respect of periods prior to its going out of business" (Pet. Add. 3). The court also rejected the Company's contention of laches in light of the fact that an intervening proceeding was necessary to determine liability of the alleged successor (Pet. Add. 4); and it agreed with the Board that the Company's "challenge to the specifications * * * was not of such a nature to warrant upsetting the Board's order in this case" (Pet. Add. 6).

4. The issues raised in the petition turn on the circumstances of this particular case—which we submit were correctly determined by the court below—and there is no conflict in the circuits. Accordingly, further review is not warranted.

Petitioner does not challenge the Board's power to award backpay in the circumstances; rather, it merely contends that the Board did not intend to do so in this case. As the court below correctly pointed out, however, the Board's supplemental decision clearly indicated its intent to order the customary backpay award here. Nor can the Company successfully complain about the Board's backpay specification. The Board's specification "put Southland clearly on notice of what the Board's investigation showed to be due to each employee in respect of back pay, taking account of interim earnings known to the Board. If Southland had any reason to challenge any one of these computations, it should

have done so with a statement of why it thought it was incorrect * * * " (Pet. Add. 6).

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1973.